

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL KLEEBERG, LISA STEIN
and AUDREY HAYS,

Plaintiffs,

v.

Civil Action No. 16-CV-9517-LAK-KHP

LESTER EBER,
ALEXBAY, LLC f/k/a LESTER EBER, LLC,
ESTATE OF ELLIOT W. GUMAER, JR.,
EBER BROS. & CO, INC.,
EBER BROS. WINE AND LIQUOR CORP.,
EBER BROS. WINE & LIQUOR METRO, INC.,
EBER CONNECTICUT, LLC, and
WENDY EBER,

Defendants.

CANANDAIGUA NATIONAL BANK & TRUST
COMPANY,

Intervenor- Plaintiff,

v.

Civil Action No. 16-CV-9517-LAK-KHP

LESTER EBER,
ALEXBAY, LLC f/k/a LESTER EBER, LLC,
ESTATE OF ELLIOT W. GUMAER, JR.,
EBER BROS. & CO, INC.,
EBER BROS. WINE AND LIQUOR CORP.,
EBER BROS. WINE & LIQUOR METRO, INC.,
EBER CONNECTICUT, LLC, WENDY EBER,
DANIEL KLEEBERG, LISA STEIN and
AUDREY HAYS,

Intervenor- Defendants.

**EBER DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND**

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PRELIMINARY STATEMENT

Pursuant to the Consent Scheduling Order, agreed to by the parties, the last day to amend pleadings was March 31, 2018. Dkt. # 80. Plaintiffs recognized this deadline and attempted to file an Amended Complaint on March 31, 2018. Dkt. # 85. Due to deficiencies in Plaintiffs' Amended Complaint, the Court extended the deadline to file amended pleadings to April 16, 2018. Dkt. # 87. Plaintiffs filed their Second Amended Complaint on April 16, 2018. Dkt. # 88. Seven and one-half months after the Court-Ordered and stipulated deadline to file amended pleadings, Plaintiffs moved to file a Third Amended Complaint. Dkt. # 164. Plaintiffs' proffered excuses of having another "high profile trial" (even though there was no trial in that matter), a vacation, and many documents to review¹ are insufficient to establish the "good cause" necessary to grant their Motion to Amend.

I. PLAINTIFFS CANNOT SHOW GOOD CAUSE FOR THEIR DELAY IN MOVING TO AMEND NEARLY EIGHT MONTHS AFTER THE DEADLINE.

"[T]he lenient standard under Rule 15(a), which provides leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'" *Grochowski v. Phx. Constr., YPSILON Constr. Corp.*, 318 F.3d 80, 86 (2d Cir. 2003) citing Fed. R. Civ. P. 15(a), 16(b). "Where . . . a scheduling order governs amendments to the complaint,' and a plaintiff wishes to amend after the deadline to do so has passed, the plaintiff must show good cause to modify the deadline under Rule 16." *BPP III., LLC v.*

¹ Plaintiffs' voluminous, overly broad document requests required the production of over 33,000 pages.

The Royal Bank of Scot. Grp., PLC, 859 F.3d 188, 195 (2d Cir. 2017) quoting *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009).

A finding of good cause depends on the diligence of the moving party. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) (citing *Rainy Lake One Stop, Inc. v. Marigold Foods, Inc.*, 195 F.3d 430, 437 (8th Cir. 1999)).

While diligence is the primary concern in determining good cause, the district court may also consider other relevant factors such as prejudice to defendants. See *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007). The Second Circuit consistently affirms denials of motions to amend where parties have delayed their motion by three months. See *Gullo v. City of New York*, 540 Fed. Appx. 45, 46-47; 2013 U.S. App. LEXIS 19983 (2d Cir. 2013) (“The district court acted well within its discretion in concluding that Plaintiffs’ three-month failure to move for amendment...failed to demonstrate the diligence necessary to satisfy Rule 16.”); *Manuel v. Pepsi-Cola Co.* 2019 U.S. App. LEXIS 7724 * (2d Cir. March 15, 2019) (Plaintiffs’ were not entitled to amend their complaint to defeat dismissal after failing to amend their pleadings prior to the court-ordered deadline).

Here, as in *BPP III, LLC, Grochowski* and *Parker*, Plaintiffs cannot show good cause to amend their complaint nearly eight months after the deadline.

As noted, the parties agreed to a deadline of March 31, 2018 to amend the pleadings. Dkt. # 80. The Court then generously provided Plaintiffs an extension to April 16, 2018 to file a Second Amended Complaint after identifying serious deficiencies in their First Amended Complaint on April 2, 2018. Dkt. # 87. Thereafter, despite multiple extensions of discovery deadlines negotiated and agreed between the parties, Plaintiffs

never requested an extension of the deadline to file amended pleadings. As the Second Circuit recently opined, "no court can be said to have erred in failing to grant a request that was not made." *Manuel*, 2019 U.S. App. LEXIS 7724 (2d Cir. March 15, 2019) quoting *Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011).

II. PLAINTIFFS RECEIVED MOST DOCUMENTS RELATED TO NEW ALLEGATIONS IN THIRD AMENDED COMPLAINT IN SEPTEMBER 2017.

Since September 2017, the Eber Defendants have produced in excess of 33,000 pages in response to Plaintiffs' voluminous, vague and overly broad document demands. Attached as **Exhibit A** are the detailed document inventories that were provided to Plaintiffs along with the Eber Defendants' productions prior to March 31, 2018. Notably, the majority of the Eber Defendants' production was produced in 2017, months before the deadline to amend the pleadings. Despite receipt of the documents on which they base their new allegations months prior to the amendment deadline, Plaintiffs failed to diligently pursue amendment the amendment now being sought.

A. Reformation of Lester Eber's Loans.

More specifically, Plaintiffs' Third Amended Complaint seeks unspecified reformation of Lester Eber's loans to Eber Bros. Plaintiffs' weakly argue that they acted diligently in seeking to amend, but they were provided with the documents related to Lester Eber's loans six months prior to the deadline for amendment of the pleadings. To this end, the Eber Defendants produced documents related to Lester Eber's loans (Bates stamped EB-00017819-18057) on September 29, 2017. Plaintiffs' failure to add these claims in their Second Amended Complaint illustrates Plaintiffs' lack of diligence and inability to show good cause as required by Rule 16.

B. Prior Transactions including Polebridge Transaction.

Plaintiffs' Third Amended Complaint also attempts to expand the scope of the action to include rescission of the alleged "preparatory transactions," including the Polebridge transaction, which Plaintiffs allege led to Alexbay's foreclosure on the Eber Metro shares. Again, the documents related to the supposed preparatory transactions were produced in 2017. For example, documents relating to the Polebridge transaction were produced on September 29, 2017 and bear Bates numbers EB-00016940-16944. Here Plaintiffs' admitted failure to "process[] the totality of the documents that had been produced" prior to the amendment deadline highlights Plaintiffs' failure of diligence in this matter. See Supplemental Brief in Support of Plaintiffs' Motion for Leave to Amend Their Complaint (Plaintiffs' Supplemental Brief), Dkt. # 202 at pg. 11.

C. Lester Eber's Consulting Agreement with Southern.

Likewise, Lester Eber's consulting agreements with Southern were among the first documents produced by the Eber Defendants. These documents were produced on September 29, 2017 (Bates numbers EB-00000702-711). The Eber Defendants also made a supplemental production in February 2018, providing Lester Eber's consulting agreement, along with Mr. Eber's tax returns from 2007 through 2016 (Bates numbers EB-00021437-21468). Plaintiffs admit that they had the documents which purportedly support this claim well before the deadline to amend. Put simply, the standard is diligence, not diligence once the attorney decides to look at the documents.

D. Acquisition of Slocum & Sons of Maine.

Next, Plaintiffs' representations with respect to the proposed Slocum & Sons of Maine acquisition allegations are inaccurate. The formation documents for the entity and

tax returns, including K-1s for the years 2012 through 2016, were produced to Plaintiffs in response to their second request for production on February 26, 2018 (EB-00021469-21497, EB-00021717-21743). Additionally, this company's 2017 K-1s were produced on March 13, 2018, a full month before the deadline to amend the pleadings (EB-00021744-21751). The K-1s show the proportionate ownership interest of each shareholder. Despite having this information from the Eber Defendants well before the deadline to amend, Plaintiffs try to justify their failure by stating that they only recently received other documents that provided the same information.

E. 2017 EBWLC Stock Issuance.

Plaintiffs admit their dilatory behavior with respect to their proposed amendments related to the issuance of stock in EBWLC in 2017.² Plaintiffs state "the specific transactions were not noticed by Plaintiffs' counsel until the summer of 2018." See Plaintiffs' Supplemental Brief at pg. 15. A "failure to notice" is not "good cause".

F. Claims Against Wendy Eber.

With respect to Plaintiffs' alleged claims against Wendy Eber for "aiding and abetting", the Eber Defendants produced documentation showing that Wendy Eber assisted her father and Mr. Gumaer with respect to the Trust in September 2017 (Bates numbers EB-00001071-1076). Moreover, Wendy's acquisition of Eber Metro Stock is contained in emails which were also produced to Plaintiffs on September 29, 2017 (Bates numbers EB-00017303-17304). Plaintiffs' statements that they were "surprised" and that

² The EBWLC stock is irrelevant because it does not constitute a majority of the outstanding voting stock of EBWLC, a fact Plaintiffs have known since September 2017 (Bates numbers EB-00001166-1173). Nor is the EBWLC Stock materially dilutive to Plaintiffs because it is not common stock or convertible preferred stock. It has a total redemption value of \$37,500.00, a fact Plaintiffs have known since September 2017.

this information was not noticed due to the volume of the production, again shows a lack of diligence and the absence of good cause.

G. Assignment of Harris Beach's Claims to Lester Eber.

The documents related to Harris Beach's claims were also produced on September 29, 2017 (Bates numbers EB-00017510-17544). Here, Plaintiffs again admit that they were not diligent in pursuing their claims "because they could not imagine" that Lester Eber may take action on the claim. However, Plaintiffs now seek to add claims which they admit are not ripe because no action has been taken by Lester Eber with respect to his ownership of Harris Beach's original claim. Plaintiffs' excuses are unconvincing and inadequate justification for failing to act with diligence.

The sum of Plaintiffs' arguments in favor amending the Second Amended Complaint months after the deadline is: (1) Plaintiffs' attorney was busy on another case; (2) if the Court does not allow Plaintiffs to amend, they will just commence another action and waste judicial resources;³ (3) the productions by the Eber Defendants were voluminous and (4) Plaintiffs delay in analyzing the documents prevented them from recognizing additional claims. None of these excuses are sufficient to meet the good cause standard of Rule 16 and articulated by the Second Circuit. Accordingly, Plaintiffs' motion should be denied.

³ Blatantly ignoring the statute of limitations problems therein as described in our previous opposition to this motion to amend the Second Amended Complaint which is incorporated by reference.

CONCLUSION

The Court should deny Plaintiffs' motion to amend their Second Amended Complaint because Plaintiffs have not acted with diligence and cannot meet the good cause standard articulated in FRCP Rule 16.

DATED: April 26, 2019
Rochester, New York

UNDERBERG & KESSLER LLP

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EXHIBIT A

Eber Southern District Litigation Client Documents - BOX 1			
Tab/Bates	Date	Author	Document Description
1 1-691	2007	Harris Beach PLLC	CD of Closing Documents-Eber Bros. Wine & Liquor Corporation Sale of PW&S, LLC and Delaware Importers, Inc. to Souther Wine & Spirits of America, Inc.
2 692-694	1/29/2008	Lester Eber	Letter to Lee F. Hager re: Amendment to July 5, 2007 letter agreement between Southern and Eber Bros.
3 695-701	1/2012 - 11/2016	Lester Eber	Representation letters-Lester Eber registered as a lobbyist for Southern
4 702-711	8/30/2007		Consulting Agreement between Souther Wine & Spirits of Upstate New York and Lester Eber
5 712-741	various		E-mails to/from E. Gumaer, D. Belt, G. Sturm
10 742-810	2015		Various litigation documents re: PBGC v. Eber Bros.
11 811-836	7/12/2017	Rita Nischal, Esq.	Settlement of the Allen Eber Residuary Trust documents
12 837-841	7/1/2008		Unanimous Written Consent of the Trustees of the Allen Eber Trust
13 842-853	4/1/2017 - 6/30/2017	Canandaigua National Bank	Bank statement for Allen Eber Residuary Trust
16 854-863	6/7/2012 and 8/11/2011	W. Eber	Meeting Minutes of the Trustees of the Trust of Allen Eber
17 864-870	1/2012	L. Eber	Notices of Alexbay's proposal to accept membership interest owned by Metro in Eber-Connecticut, LLC in satisfaction of the obligations created in the Note, etc.
18 871-879	6/5/2012		Agreement for Turnover and Acceptance of Eber Bros. Wine and Liquor Metro, Inc. and ERM-14 Form
19 880-896	12/13/2012		Unanimous Written Consent of Board of Directors of Eber Bros. Wine and Liquor Metro, Inc., Stock Certificate and General Security Agreement between Eber Metro and Alexbay
20 897-899	1/18/2012		Assignment of Note and Security Agreement re: August 15, 2005 Note with Eber Bros. Corp.
21 900-902	1/18/2012		Assignment of Note and Security Agreement re: February 26, 2010 Note with Eber Bros. Metro
23 903-952	2013-2016		First Niagara Account Statements - Alexbay, LLC
24 953-956	3/7/2017 - 6/30/2017		Citizens Bank Commercial Account Statements - Alexbay, LLC
25 957-965	11/30/2016 - 6/30/2017		KeyBank Business Banking Statements - Alexbay, LLC
26 966-1005	3/31/2016 - 3/31/2017		QBE Insurance Corporation insurance policy for Alexbay, LLC
27 1006-1056	12/8/2011		Operating Agreement of Leter Eber LLC
28 1057-1058	1/28/2013		Written Consent of Sole Member of Alexbay, LLC and Written Consent of Board of Managers of Eber-Connecticut, LLC re: 2.9 million term loan and 500K demand loan
29 1059-1070	3/14/2012		Affidavit of Lester Eber in support of motion for judicial determination of commercial reasonableness
30 1071-1077	12/15/2009	L. Eber	Letter to Sally Kleeberg re: no dividend payment; copy of check to S. Kleeberg; thank you note from S. Kleeberg
31 1078-1165	various		Allen Eber Residuary Trust documents
32 1166-1346			Various corporate minutes/documents for Eber Bros. Wine and Liquor Corporation
33 1347-1424			Various corporate minutes/documents for Eber Metro

Tab/Bates	Date	Author	Document Description
34 1425-1475			Various corporate minutes/documents for Eber Connecticut
35 1476-1507	1/2008		Letter Agreement and other documents regarding sale of Interest in Eber-Connecticut, LLC
36 1508-1544	4/1/2008		Amended and Restated Limited Liability Company Agreement of Eber-Connecticut, LLC
37 1545-1555			Minutes of Eber-Connecticut, LLC
41 1556-1605			Quarterly commission payment documentation re: Elliott Gumaer, Jr.
42 1606-1670	8/11/2010 - 12/31/2010		Sally Kleeberg paid bills
43 1671-1709	3/22/2010 - 4/27/2010	L. Eber	Letters from L. Eber to Sally Kleeberg regarding Eber Bros. Wine & Liquor Corp. financial status
44 1710-1747	4/2/2010 & 4/9/2010	L. Eber	Letters to Audrey Hays regarding Eber Bros. Wine & Liquor Corp. financial status
45 1748-1825	5/31/2009 & 2008 (restated)		Eber-Connecticut, LLC draft Financial Statements, Supplemental Schedules and Independent Auditors' Report
47 1826-1876	2009		Residuary TOW Allen Eber tax documents
48 1877-1964	6/5/2007 - 12/31/2009		Canandaigua National Bank & Trust Statements for Residuary TOW Allen Eber
49 1965-2117	1/1/2010 - 12/31/2012		Canandaigua National Bank & Trust Statements for Residuary TOW Allen Eber
50 2118-2201	1/1/2013 - 12/31/2014		Canandaigua National Bank & Trust Statements for Residuary TOW Allen Eber
51 2202-2294	1/1/2015 - 3/31/2017		Canandaigua National Bank & Trust Statements for Residuary TOW Allen Eber
52 2295-2307	1/20/2017	Richard Hawks, Jr.	Letter to L. Eber re: share of 2016 annual trust income and Statement of Assets

Eber Southern District Litigation			
Client Documents - BOX 2			
Bates	Date	Author	Document Description
2308-	September 2009 - December 2010	Canandaigua National Bank	Operating Account statements, reconciliation summaries for Eber Bros. Wine & Liquor Metro, Inc.
5479	September 2009 - December 2010	Canandaigua National Bank	Operating Account statements, reconciliation summaries for Eber Bros. Wine & Liquor Corp.

Eber Southern District Litigation Client Documents - BOX 3			
Tab/Bates	Date	Author	Document Description
5480-10327	June 2007- August 31, 2016	Canandaigua National Bank	Eber Bros. Wine & Liquor Corp. Pension Documents
1 10328-10501	10/8/2008	Canandaigua National Bank	Eber-Connecticut, LLC 3 Million Dollar Line of Credit and extension documents
2 10502-10519	1/19/2016	Hon. Michael A. Telesca	Western District of New York Decision and Order dated 1/19/2016 re: Pension Benefit Guaranty Corporation v. Ebert Bros. Win & Liquor Corp.
3 10520-10547	8/28/2009	Canandaigua National Bank	Eber Bros. Wine & Liquor Corp. Retirement Plan Account Review
4 10548-10576	2007		Trust Agreement concerning Eber Bros. Wine & Liquor Corp. Retirement Plan
5 10577-10634	9/29/2007 - 5/31/2012	Canandaigua National Bank	Eber Bros. Wine and Liquor Metro Inc. Basic Business Checking Statements
6 10635-10639	6/5/2012		Agreement for Turnover and Acceptance of Eber Bros. Wine and Liquor Metro, Inc. pursuant to NYUCC
7 10640-10648	7/20/2007	Canandaigua National Bank	Eber Bros. Pension Plan Holdings
8 10649-10652	8/7/2007		Investment Policy Statement Eber Bros. Wine & Liquor Defined Benefit Plan

Eber Southern District Litigation Client Documents - BOX 4			
Bates	Date	Author	Document Description
10653- 10698	various	Canandaigua National Bank	Miscellaneous Eber Bros. Wine & Liquor Retirement Plan documents

Eber Southern District Litigation Client Documents - BOX 5			
Tab/Bates	Date	Author	Document Description
10 10699-11008	2007-2010	Pitney Bowes	Eber Bros. Wine & Liquor Statements
11 11009-11094	January 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers
12 11095-11121	January 2011		Eber Bros., Eber Metro and Eber NDC deposit records, cash summaries and Statement Detail Reports
13 11122-11201	February 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers
14 11202-11228	February 2011		Eber Bros., Eber Metro and Eber NDC deposit records, cash summaries and Statement Detail Reports
15 11229-11311	March 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers
16 11312-11335	March 2011		Eber Bros., Eber Metro and Eber NDC deposit records, cash summaries and Statement Detail Reports
17 11336-11416	April 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers
18 11417-11431	April 2011		Eber Bros., Eber Metro and Eber NDC deposit records, cash summaries and Statement Detail Reports
19 11432-11455	5/31/2011		Eber Metro A/R Aging Summary as of 5/31/2011
20 11456-11548	5/31/2011		Eber Bros. A/R Aging Summary as of 5/31/2011
21 11549-11629	May 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers
22 11630-11662	May 2011		Eber Metro, Eber Bros. & Eber NDC A/P balances, cash summaries, bank reports and A/R summaries with notes
23 11663-11771	June 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers; Eber Bros., Eber Metro & Eber NDC statement detail reports, cash summaries and deposit records
24 11772-11848	July 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers and statement detail reports; Cash summaries including Eber NDC
25 11849-11912	August 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers and statement detail reports; Cash summaries including Eber NDC
26 11913-11953	September 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers and statement detail reports; Cash summaries including Eber NDC
27 11954-12002	October 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers and statement detail reports; Cash summaries including Eber NDC
28 12003-12018	November 2011	Canandaigua National Bank	Eber Bros. and Eber Metro transaction registers and statement detail reports
29 12019-12035	December 2011	Canandaigua National Bank	Eber Bros. and Eber NDS deposit records
30 12036-12040	January 2012	Canandaigua National Bank	Eber Bros. deposit records
31 12041-12051	February 2012	Canandaigua National Bank	Eber Bros. and Eber Metro checking account details and deposit records
32 12052-12066	March 2012	Canandaigua National Bank	Eber Bros. checking account details and deposit records
33 12067-12085	April 2012	Canandaigua National Bank	Eber Bros. and Eber Metro checking account details and deposit records
34 12086-12101	May 2012	Canandaigua National Bank	Eber Bros. and Eber Metro checking account details and deposit records
35 12102-12119	June 2012	Canandaigua National Bank	Eber Bros. and Eber Metro checking account details and deposit records

[illegible]

Eber Southern District Litigation Client Documents - BOX 6			
Tab/Bates	Date	Author	Document Description
2 12534-12882	8/31/2007	Eber	Accounts Receivable Post & Apply report
3 12883-12995	3/31/2008 - 7/31/2013	Canandaigua National Bank	Eber Bros. Wine & Liquor Corp. - Financial Summaries for CNBusiness Choice Savings and Basic Business Checking Acct. ending 8478
4 12996-13069	9/28/2007 - 5/31/2012	Canandaigua National Bank	Eber Metro LLC - Financial Summaries for CNBusiness Choice Acct. ending 8494
5 13070	1/30/2008		\$33,299.76 Demand Note - Eber Bros. to Wendy Eber
6 13071	6/18/2008		\$25,000 Demand Note - Eber Bros. to Wendy Eber
7 13072	3/26/2009	Wendy Eber	Check No. 2012 payable to Eber Bros. in the amount of \$12,000
8 13073	3/24/2009	Lester Eber	Check No. 341 payable to Eber Bros. in the amount of \$12,363.72
9 13074-13167	8/31/2007 - 5/31/2012	Canandaigua National Bank	Eber Metro LLC - Financial Summaries for CNBusiness Choice Acct. ending 8516
10 13168-13291	10/31/2007 - 11/30/2012	Canandaigua National Bank	Eber Bros. Wine & Liquor Corp. - Financial Summaries for CNBusiness Choice Acct. ending 8389
11 13292-13369	December 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
12 13370-13378	December 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
13 13879-13382	12/18/2008	Canandaigua National Bank	Eber Bros. chargeback/service charge
14 13383-13457	November 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
15 13456-13460	November 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
16 13461	11/21/2008	Canandaigua National Bank	Deposit receipt for Eber Bros. \$18,885.09
17 13462-13557	October 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
18 13558-13563	October 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
19 13564-13643	September 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
20 13644-13648	September 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
21 13649-13732	August 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
22 13733-13743	August 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
23 13744-13820	July 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
24 13821-13841	July 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
25 13842-13843	7/7/2008	Canandaigua National Bank	Receipts
26 13844-13925	June 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
27 13926-13966	June 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
28 13967-13976	June 2008	Canandaigua National Bank	Receipts

Tab/Bates	Date	Author	Document Description
29 13977-14060	May 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
30 14061-14087	May 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
31 14088-14110	May 2008	Canandaigua National Bank	Various communications/receipts
32 14111-14198	April 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
33 14199-14226	April 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
34 14227-14234	April 2008	Canandaigua National Bank	Various communications/receipts
35 14235-14322	March 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
36 14323-14360	March 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
37 14361-14371	March 2008	Canandaigua National Bank	Various communications/receipts
38 14372-14469	February 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
39 14470-14551	February 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
40 14552-14572	February 2008	Canandaigua National Bank	Various communications/receipts
41 14573-14678	January 2008	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
42 14679-14751	January 2008	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
43 14752-14768	January 2008	Canandaigua National Bank	Various communications/receipts
44 14769-14776	January 2008	Eber	Daily cash sheets
45 14777-14877	December 2007	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
46 14878-14978	December 2007	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
47 14979-15034	December 2007	Canandaigua National Bank	Various communications/receipts
48 15035-15062	December 2007	Eber	Daily cash sheets
49 15063-15174	November 2007	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
50 15175-15242	November 2007	Canandaigua National Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
51 15243-15274	November 2007	Canandaigua National Bank/Wells Fargo	Various communications/receipts
52 15275-15299	November 2007	Eber	Daily cash sheets
53 15300-15303	11/2 -11/3/2007	Wells Fargo	Eber Bros. & Eber Metro Treasury Information Report
54 15304-15451	October 2007	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
55 15452-15546	October 2007	Canandaigua National Bank/Wells Fargo	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
56 15547-15573	October 2007	Canandaigua National Bank	Various communications/receipts
57 15574-15597	October 2007	Canandaigua National Bank	Disbursement Account

Tab/Bates	Date	Author	Document Description
58 15598-15633	October 2007	Eber	Daily cash sheets
59 15634-15683	October 2007	Wells Fargo	Eber Bros. & Eber Metro Treasury Information Report
60 15684-15693	October 2007	Wells Fargo	Disbursement Account
61 15694-15780	September 2007	Canandaigua National Bank	Eber Bros. & Eber Metro Transactions Register
62 15781-15915	September 2007	Canandaigua National Bank/Wells Fargo/M&T Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
63 15916-15960	September 2007	Eber	Daily cash sheets
64 15961-15991	September 2007	Canandaigua National Bank/Wells Fargo/M&T Bank	Various communications/receipts
65 15992-16068	September 2007	Wells Fargo	Eber Bros. & Eber Metro Treasury Information Report
66 16069-16130	September 2007	Wells Fargo	Disbursement Account
67 16131-16188	September 2007	M&T Bank	Eber Bros. Previous Day Balance Reports
68 16189-16281	September 2007		Miscellaneous financials
69 16282-16299	August 2007	Canandaigua National Bank/Wells Fargo	Statement Detail Reports
70 16300-16398	August 2007	M&T Bank	Eber Bros. Previous Day Balance Reports
71 16399-16453	August 2007	Canandaigua National Bank/Wells Fargo/M&T Bank	Various communications/receipts
72 16454-16561	August 2007	Canandaigua National Bank/Wells Fargo/M&T Bank	Miscellaneous payments received/wires for Eber Bros., Eber Metro and Eber NDC
73 16562-16607	August 2007	Eber	Daily cash sheets
74 16608-16756	August 2007	Wells Fargo	Eber Bros. & Eber Metro Treasury Information Report
75 16757-16855	August 2007	Wells Fargo	Disbursement Account

Eber Southern District Litigation BOX 7			
Tab/Bates	Date	Author	Document Description
1 16856-16868	1/29/2008		Letter and payment agreement regarding sale of Eber-Connecticut, LLC
3 16869-16889	10/2/2008	CNB	Eber-Connecticut, LLC CNB Loan Commitment
4 16890-16906	6/27/1905		Formation documents for Eber-Connecticut, LLC
7 16907-16914	2015		Polebridge documents
10 16915-16939	1/28/2013	Eber-Connecticut	Board Meeting Minutes
11 16940-16950	2/26/2010 and 5/28/2010	Eber Bros. W&L	Board Meeting Minutes
12 16951-16953	3/13/2012	Eber Bros. W&L and Eber Metro	Joint Board Minutes
13 16954-17029		Eber Bros. W&L	Various corporate documents
15 17030-17033	11/13/2012 and 1/30/2013		Written Consents re: term note and demand loan
16 17034-17086			Eber Bros. Wine & Liquor Corporation corporate minutes and certificate of incorporation
22 17087-17222	1/29/2008		Sale of interest in Eber-Connecticut documents
23 17224-17371	2013-2014		Documents produced to Pension Benefit Guaranty Corporation
25 17373-17390	10/27/1969		Last Will & Testament Allen Eber
26 17392-17498			Trust documents
27 17499-17500	8/20/2015	Pension Benefit Guaranty Corp.	Letter to Eber Bros. Wine & Liquor Corporation regarding Confidentiality Agreement
29 17501-17509	2017		Certificate of Release of PBGC Federal Liens
30 17510-17544	10/2015		Settlement Documents re: Harris Beach PLLC v. Ebert Bros. Wine & Liquor Corp., et al. NYS Supreme Court Action
31 17545-17664			Pension Benefit Guaranty Corporation v. Eber Bros. Wine & Liquor, Corp. Western District of New York litigation documents
32 17666-17686	6/8/2016		PBGC Settlement proposal and Final Settlement Agreement
33 17688-17768			Various correspondences concerning PBGC
34 17770-17775	8/1/2016		Copies of PBGC Federal Liens
35 17777-17817			PBGC various letters and subpoenas
36 17819-18057			Confidential Settlement Documents with PBGC

Eber Southern District Litigation Client Documents - BOX 8		
Tab No.	Bates Number	Document Description
1	18058-18107	EBW&L Pension Funding Notices
2	18108-18129	2014 Eber-Connecticut 2014 Federal Tax Return
5	18130	PBGC wire
6	18131-18140	NYS Teamsters re: Eber Bros. Withdrawal Liability
7	18141-18146	NYS Teamsters re: Eber Bros. Withdrawal Liability
8	18147	E-mail dated 3/10/2008 from M. Ryan to J. Runke re: Eder LLC
9	18148-18227	Eber-Connecticut LLC docs and photographs
10	18228-18292	Eber-Connecticut LLC docs (duplicate)
11	18293-18324	Eber-Connecticut LLC docs (duplicate)
12	18325-18360	Eber-Connecticut LLC docs (duplicate)
13	18361-18365	Agreement for Turnover dated 6/5/2012
15	18366-18378	Alexbay formation and tax documents
17	18379-18395	Amended Security Agreement 2/11/2011
19	18396-18419	Slocum & Sons A/P as of 11/30/2013
20	18420-18499	Slocum & Sons A/R by sales person as of 11/30/2013
21	18500	Slocum & Sons A/R as of 11/30/2013
22	18501	Auditor Invoices 3/25/2004
23	18502-18504	Slocum & Sons August 2014 financials
24	18505-18556	Bank Loan CNB to Eber-Connecticut 1/2013
25	18557-18608	Bank Loan CNB to Eber-Connecticut 1/2013 (duplicate)
26	18609-18714	Bank Loan due diligence
30	18715-18733	EBW&L employee files sent to PBGC
32	18734-18741	Board Meeting related to loans
33	18742	Borrower Base Certificate Eber-Connecticut LLC 11/30/2013
36	18743-18763	CN Bank 4 Million credit line to Eber-Connecticut 10/2/2008
37	18764-18817	CN Bank 3 Million credit line to Eber-Connecticut 4/8/2008
38	18818-18843	CN Bank 3 Million credit line to Eber-Connecticut 6/26/2008
44	18844-18845	PBGC Notice dated 6/2012 (failure to make contributions)
46	18846-18869	EBW&L Federal Tax Return 2009
47	18870-18890	EBW&L Federal Tax Return 2010
48	18891-18911	EBW&L Federal Tax Return 2011
49	18912-18927	EBW&L Federal Tax Return 2012
50	18928-18941	EBW&L Federal Tax Return 2013
51	18942-18960	Actuarial Valuation Report EBW&L Retirement Plan 6/1/2011
52	18961-18964	3/29/2016 PBGC Demand Letter to W. Eber
53	18965-18985	EBW&L employee files sent to PBGC (duplicate)
54	18986-19004	Signed pension request
57	19005-19006	10/15/2012 Eber Bros. letter to PBGC
58	19007-19008	7/2/2012 Eber Bros. letter to PBGC
60	19009-19012	3/29/2016 PBGC Demand Letter to W. Eber
61	19013-19016	3/29/2016 PBGC Demand Letter to L. Eber
62	19017-19018	PBGC Notice dated 9/2012 (failure to make contributions)
63	19019-19038	Eber Pension Benefit files sent to PBGC
64	19039	Eber Quarterly Funding
66	19040-19067	Eber-Connecticut Federal Tax Return 2011
67	19068-19082	Eber-Metro Federal Tax Return 2012

Tab No.	Bates Number	Document Description
68	19083-19096	Eber-Metro Federal Tax Return 2013
69	19097-19116	Eber-Metro Federal Tax Return 2011
70	19117-19133	Eber-Metro Federal Tax Return 2014
71	19134-19144	Eber Bros Co., Inc. Federal Tax Return 2014
72	19145-19154	EBW&L Federal Tax Return 2014
73	19155-19183	Eber-Connecticut Tax Return 2012
74	18194-19210	Eber-Connecticut Tax Return 2013
75	19211-19237	Eber-Connecticut Tax Return 2013 (duplicate)
79	19238-19247	EBW&L Tax Return 2012
80	19248-19256	EBW&L Tax Return 2013
81	19257	EBW&L first page only Tax Return 2009
82	19258-19270	Slocum & Sons 5/31/2013 financial statement
83	19271-19306	Form 200 to PBGC 6/2013
84	19607-19341	Form 200 to PBGC 3/2013
85	19342-19405	Form 200 to PBGC 9/2013
89	19406-19410	Alexbay v. Eber, et al. Notice of Entry dated 5/24/2012
91	19411-19413	Slocum & Sons 7/2014 Financials
92	19414-19436	EBW&L letter dated 7/13/2013 to PBGC
93	19437-19439	Slocum & Sons 6/2014 Financials
96	19440-19446	Kleeberg v. Kleeberg Order re: QDRO & benefits
100	19447-19480	Various years-L. Eber checks & EBW&L bank statements
101	19481	Financials for Eber-Connecticut 2009
106	19482-19496	May 2007/2008 Eber-Connecticut Auditor's Report
107	19497-19509	May 2009/2010 Eber-Connecticut Auditor's Report
108	19510-19522	May 2011/2012 Eber-Connecticut Auditor's Report
109	19523-19561	Form 200 to PBGC 3/13/2013
110	19562-19564	Slocum & Sons 11/2014 Financials
111	19565-19567	Slocum & Sons 10/2014 Financials
112	19568-19607	EBW&L Benefits requests/status 12/9/2015
115	19608	PBGC filing 1/13/2011
116	19609-19630	PBGC filing 10/17/2011
117	19631-19673	PBGC Premium Filings website
118	19674-19675	Polebridge Note 5/26/2016
121	19676-19698	Form 200 to PBGC 1/15/2013
124	19699-19702	Slocum & Sons A/R and Aged Trial Balances 11/30/2013
125	19703	Form 200 to PBGC 1/13/2011
126	19704-19719	PBGC Notices and EBW&L financials 2011/2012
127	19720-19722	Slocum & Sons 9/2014 Financials
133	19723-19736	Verification of Pension Payments 12/2015
138	19737-19746	Eber-Connecticut Written Consents

Eber Southern District Litigation Client Documents - BOX 9			
Tab/Bates	Date	Author	Document Description
1 EB-00019747 - EB-00019749	11/2013; 1/2014	Citizens Bank	Eber Bros. Wine and Liquor Metro Commercial Account Statements and Notification of closed account
2 EB-00019750	7/1/2014-9/30/2014	TD Bank	Eber Bros. Wine and Liquor Corp. Statement of Account
3 EB-00019751	10/31/2016	KeyBank	Alexbay LLC Business Banking Statement
4 EB-00019752 - EB-00019763	10/31/2016- 10/31/2017	KeyBank	Eber Bros. & Co., Inc. Business Banking Statements
5 EB-00019764 - EB-00019785	7/31/2014- 9/30/2016	First Niagara	Eber Bros. & Co., Inc. Account Statements
6 EB-00019786 - EB-00019803	2/23/2017- 10/31/2017	Citizens Bank	Eber Bros. Wine and Liquor Metro Business Advisor Account Statements
7 EB-00019804 - EB-00019830	1/2012-6/2012	W. Eber/B. Lowenthal	Various e-mail correspondence concerning Canandaigua National Bank extending credit facility to Eber Connecticut LLC
8 EB-00019831 - EB-00019832	7/3/2012	B. Lowenthal	E-mail to W. Eber with notice of CNB extension of credit facility to Eber Connecticut LLC
9 EB-00019833 - EB-00019850	8/2/2012	B. Lowenthal	E-mail to W. Eber with commitment letter concerning CNB extension of credit facility to Eber Connecticut LLC
10 EB-00019851 - EB-00019864	11/16/2012	B. Lowenthal	E-mail to W. Ebert with revised commitment letter concerning CNB extension of credit facility to Eber Connecticut LLC
11 EB-00019865 - EB-00020030	3/7/2013	Underberg & Kessler LLP	Enclosure letter and Index of CNB / Eber Connecticut LLC closing documents
12 EB-00020031	5/31/2011	W. Eber	Eber Connecticut LLC covenants
13 EB-00020032 - EB-00020033	5/2011; 6/2011	W. Eber	Accounts Receivable and Inventory Borrowing Base Certificate of Eber Connecticut LLC for CNB
14 EB-00020034 - EB-00020097	2009/2010	Canandaigua National Bank	2010 Loan Documents - Eber Connecticut LLC
15 EB-00020098 - EB-00020124	2010	A. Dettmer / W. Eber	Various e-mail correspondence concerning the PBGC
16 EB-00020125 - EB-00020126	2013-2015		Projections sent to PBGC
17 EB-00020127	2010-2015		Historical Financial Data for Eber Connecticut LLC for PBGC
18 EB-00020128 - EB00020132	2011-2018		Historical Financial Data and projections for Slocum & Sons for PBGC
19 EB-00020133 - EB-00020181	8/17/2015	Office of Counsel for PBGC	PBGC v. Ebert Bros. Wine & Liquor Corp. Motion for Summary Judgment
20 EB-00020182 - EB-00020186	2011		Eber Bros. Wine & Liquor Metro U.S. Corp. Tax Return

Tab/Bates	Date	Author	Document Description
21 EB-00020187 - EB-00020188	6/2010-5/2011		Eber Bros. Wine & Liquor Metro Adjusting Journal Entries
22 EB-00020189 - EB-00020215	6/2007-5/2011		Eber Bros. Wine & Liquor Metro Financials
23 EB-00020216	5/31/2012		Eber-Metro, LLC Trial Balance
24 EB-00020217 - EB-00020221	5/31/2008		Eber Bros. Wine & Liquor Metro General Ledger
25 EB-00020222 - EB-00020229	5/31/2010- 5/31/2011		Eber Bros. Wine & Liquor Metro General Ledger
26 EB-00020230 - EB-00020234	2011		Eber Bros. Wine & Liquor Corp. U.S. Corp. Tax Return
27 EB-00020235 - EB-00020237	6/2010-5/2011		Eber Bros. Wine & Liquor Corp. Adjusting Journal Entries
28 EB-00020238 - EB-00020252	5/31/2009		Eber Bros. Wine & Liquor Corp. General Ledger
29 EB-00020253 - EB00020269	5/31/2010		Eber Bros. Wine & Liquor Corp. General Ledger
30 EB-00020270 - EB-00020274	5/31/2012		Eber Bros. Wine & Liquor Corp. AP Aging Summary & Trial Balance spreadsheet
31 EB-00020275	5/31/2011		Eber Bros. Wine & Liquor Corp. Consolidated Ending Balance Sheet
32 EB-00020276 - EB-00020280	7/18/2012		Eber Bros. Wine & Liquor Corp. General Ledger Transaction Edit List & AP History Report
33 EB-00020281 - EB-00020323	5/31/2008- 5/31/2013		Eber Bros. Wine & Liquor Corp. Financials
34 EB-00020324 - EB-00020325	8/11/2003 & 8/11/2004	J. Ryan, CPA on behalf of Eber Bros.	Letter confirming D. Kleeberg's amount owed to Eber Bros.
35 EB-00020326	12/10/2001	J. Shaw CPA	Letter to J. Ryan @ Eber Bros. regarding D. Kleeberg pay structure
36 EB-00020327 - EB-00020332	10/31/2007		Closing Statement for 155 Paragon Drive, Town of Ogden
37 EB-00020333	2006-2016		Summary of Lester Eber's payments for Liabilities to Eber Bros. Wine and Liquor Corp.
38 EB-00020334 - EB-00020335	9/20/2010	Harris Beach PLLC	Letter to W. Eber enclosing \$1,200.00 payment relative to the Sidal settlement
39 EB-00020336 - EB-00020544	12/11/2014	Harris Beach PLLC	Affidavit of P. Dalton with exhibits re: Preliminary Injunction; Harris Beach PLLC v. Eber Bros. Wine & Liquor Corp., Alexbay, LLC, et al. Index No.: 2014-13623; Defendants' opposition papers
40 EB-00020545 - EB-00020576	2011		Pleadings-Harris Beach PLLC v. Eber Bros. Wine & Liquor Corp. Index No.: 11/11436

Tab/Bates	Date	Author	Document Description
41 EB-00020577 - EB-00020600	2011-2012		Discovery-Harris Beach PLLC v. Eber Bros. Wine & Liquor Corp. Index No.: 11/11436
42 EB-00020601 - EB-00020720	6/2013		Plaintiff's Motion for Summary Judgment; Defendants' Opposition-Harris Beach PLLC v. Eber Bros. Wine & Liquor Corp. Index No.: 11/11436
43 EB-00020721 - EB-00020767	7/3/2014	Harris Beach PLLC	Plaintiff's OTSC and Exhibits Index No.: 11/11436
44 EB-00020768 - EB-00020801	1/10/2014	Hon. J. Scott Odorisi	Decision & Order re: Plaintiff's Motion for Summary Judgment Index No.: 11/11436
45 EB-00020802 - EB-00020811	1/15/2015	Hon. J. Scott Odorisi	Decision & Order re: Defendants' Motion to vacate the Amended Judgment; Plaintiff's Opposition Index No.: 11/11436
46 EB-00020812 - EB-00020823	2/2014	S. Yoder, Esq.	Motion to stay enforcing the judgment in the trial court; Appellate Division, Fourth Department Docket No.: CA14-150
47 EB-00020824 - EB-00020846	various		Wolf Concept documents/invoices
48 EB-00020847	8/18/2011		Minutes from meeting of the Officers of the Trust of Allen Eber re: L. Eber loans; S. Kleeberg distribution for medical expenses
49 EB-00020848	9/20/2011	R. Hawks, Jr.	Letter to W. Eber regarding L. Kleeberg Stein's request for distribution
50 EB-00020849 - EB-00020861		Eber Bros.	Eber Bros. Employee Pension spreadsheet
51 EB-00020862	12/9/2015	Eber Bros.	Table showing pension plan participants contacting Eber Bros. since 3/31/2014
52 EB-00020863 - EB-00020877	6/2013-5/2016	Eber Bros.	CNB Monthly Pension Account spreadsheet
53 EB-00020878 - EB-00020889	12/8/2015	Eber Bros.	Eber Bros. Pension-Deceased members
54 EB-00020890 - EB-00021066		Eber Bros.	Pension records for various employees

Eber Southern District Litigation Eber Defendants' Responses to Plaintiffs' Second Request for Production	
Bates No.	Description
EB-00021067 - EB-00021108	Eber Bros formation documents
EB-00021009 - EB-00021110	Eber W & L Stock Certificates
EB-00021111 - EB-00021125	Eber Conn formation documents
EB-00021126 - EB-00021138	Eber Bros. Acquisition formation documents
EB-00021139 - EB00021164	Eber Rhode Island formation documents
EB-00021165 - EB-00021340	CNB e-mails with W. Eber
EB-00021341 - EB-00021419	CNB Invoices for Eber Conn loan
EB-00021420 - EB-00021436	Wendy & Lester salary documents
EB-00021437 - EB-00021468	Southern/Lester Consulting Agmt. and 2007-2016 IRS 1040 showing fees
EB-00021469 - EB-00021496	Slocum of Maine 2015 Tax Return
EB-00021497	Slocum of Maine 2014 Distributions to Wendy & Lester
EB-00021498 - EB-00021715	Kleeberg loan backup documents
EB-00021716	September 1999 Kleeberg Promissory Note
EB-00021717 - EB-00021743	Slocum of Maine formation documents



underberg & kessler LLP

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March 13, 2018

VIA E-MAIL AND FIRST CLASS MAIL

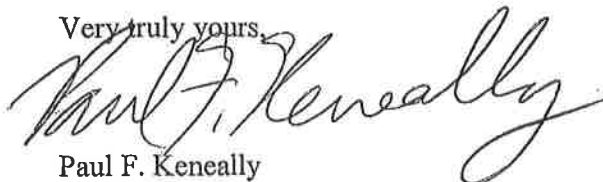
Brian C. Brook, Esq.
Clinton Brook & Peed
101 Hudson Street, Suite 2100
Jersey City, NJ 07302

RE: Daniel Kleeberg, Lisa Stein and Audrey Hays v. Lester Eber, et al.
Civ. Action No.: 16-cv-9517

Dear Mr. Brook:

Enclosed and served upon you, please find Bates Stamped documents EB-00021744 – EB-00021751 which are in addition to the Eber Defendants' Responses to Plaintiffs' Second Requests for Production of Documents dated February 26, 2018. Please note that pursuant to the Stipulated Protective Order, we deem all documents containing any financial information regarding any Eber Defendants included in this production as confidential.

Very truly yours,


Paul F. Keneally

PFK/mds
Enclosure

cc: Donald O'Brien, Esq. (w/ enc. via e-mail and First Class Mail)
Robert Calihan, Esq. (w/ enc. via e-mail and First Class Mail)

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